

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Stations.)

(Moncks Corner, Kiawah Island, and)
Sampit, South Carolina))

MM Docket No. 94-70

RM-8474

RM-8706

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION

L.M. Communications II of South Carolina, Inc. ("LMC"), licensee of Station WNST(FM) (formerly WJYQ(FM)), Moncks Corner, South Carolina, by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby replies to the "Opposition to LMC Petition for Reconsideration," filed by Sampit Broadcasters ("SB"), in the above-captioned proceeding.¹ In support whereof, the following is shown.

I. BACKGROUND

On July 19, 1996, the Allocations Branch of the Federal Communications Commission's Mass Media Bureau ("FCC" or the "Commission") released a Report and Order

¹ On September 30, 1996, by consent of counsel to Sampit Broadcasters ("SB"), LMC requested a 15-day extension of time, to and including October 18, 1996, to reply to the September 20, 1996 "Opposition to LMC Petition for Reconsideration" filed by SB ("SB Opposition"). Accordingly, by consent of counsel to SB, this reply is timely filed.

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denying the petition for rulemaking filed by Ceder Carolina Limited Partnership² which proposed the substitution of Channel 288C2 for Channel 287C3, the reallocation of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, and the modification of Station WNST(FM)'s license accordingly.³ The Commission stated, in pertinent part, that it was "doubtful that permission would be granted for a transmitter site in any of the area" of Kiawah Island in light of concerns that the proposed transmitter site was in a "marshy area" and "close to an airport."⁴ The Commission noted that although it generally presumes that a technically feasible site exists, it concluded, based on a staff engineering analysis, that it lacked reasonable assurance that a transmitter site was "suitable or available."⁵

In response, on August 19, 1996, LMC petitioned the Commission to reconsider its decision.⁶ In its Petition, LMC verified that a fully spaced site on dry land was both available and suitable for the construction of an antenna tower 500 feet above ground level, and provided a statement from John Allen, an airspace consultant, who opined that "the FAA's [Federal Aviation Administration] aeronautical study in my opinion will be a determination of No Hazard to Air

² Ceder Carolina Limited Partnership was the original permittee of WJYQ(FM). See Moncks Corner, Kiawah Island, and Sampit, South Carolina, DA 96-1149, slip op. at 1 n.2 (Allocations Branch, released July 19, 1996) ("Report and Order").

³ Report and Order, DA 96-1149, slip op. at 1. The Commission also denied the counterproposal of SB for the allotment of Channel 289A to Sampit, South Carolina, concluding that Sampit was not a "'community' for allotment purposes." Id. at 8.

⁴ Id. at 7.

⁵ Id. at 7-8.

⁶ See Petition for Reconsideration, MM Docket No. 94-70, RM-8474, RM-8706 (filed August 19, 1996) ("LMC Petition").

Navigation,” allowing WNST to operate from that site.⁷ On September 20, 1996, SB opposed LMC’s Petition arguing that it was “in reality . . . a late-filed counterproposal” for “22nd service to the Charleston, South Carolina, Urbanized Area” and that LMC “failed to carry its burden of proof to show that a suitable transmitter site is available.”⁸

In this reply, LMC demonstrates that SB has provided no support for its request that the portion of the Report and Order denying LMC’s proposal to upgrade Channel 287C3 to Channel 288C2 and reallocate Channel 288C2 from Moncks Corner to Kiawah Island should be affirmed and LMC’s Petition for Reconsideration denied. Indeed, LMC has responded fully to the concerns enumerated in the Report and Order and, consistent with Commission precedent, has sufficiently proven the availability and suitability of a transmitter site. Accordingly, LMC reaffirms its request for reconsideration of that portion of the Report and Order that denies LMC’s upgrade and reallocation proposal, and urges the Commission to grant its Petition for Reconsideration.

II. DISCUSSION

A. The LMC Petition Is Not Intended, Nor Is It Considered By Commission Precedent To Be, A Counterproposal.

In its Opposition, SB claims that LMC’s Petition is a “guise” for a late-filed counterproposal because the reference coordinates cited therein are five miles from the coordinates cited in the *Notice of Proposed Rulemaking* in this proceeding.⁹ Exactly what forms the basis of this perplexing argument is unclear. LMC’s Petition simply demonstrated that there is

⁷ See LMC Petition at 8 & Exhibit 2.

⁸ SB Opposition at 2.

⁹ See SB Opposition at 6.

an available site on dry land, which is expected to receive FAA approval within the area meeting the FCC's minimum separation requirements for Channel 288C2 at Kiawah Island, South Carolina.

In this regard, the Commission has consistently maintained:

[i]n rule making proceedings to allot FM channels . . . 'the availability and suitability of an antenna site in a marginal situation is important only to the extent of whether, if a channel were to be assigned, there is a reasonable assurance that a station would be able to provide adequate service to the community. The question of whether a specific site is legally available and suitable is a matter to be more appropriately considered in connection with an application for a construction permit for the use of a channel.'¹⁰

In other words, what is required of petitioners in allotment proceedings is a reasonable assurance that a theoretical site or "potential sites" which meet the Commission's various technical rules exist.¹¹

SB maintains that "[t]he reference point is the *sine qua non* of a petition for rule making" and that a change in reference coordinates is equivalent to a "*de facto* counterproposal."¹² However, SB fails to cite a single case where the Commission considered a petitioner's change in reference coordinates a counterproposal. Indeed, Commission precedent

¹⁰ Randolph and Brandon, Vermont, 6 FCC Rcd 1760, 1764 n.4 (1991) ("Randolph") (citing Pinckneyville, Illinois, 30 R.R.2d 1344, 1347 (1974) (emphasis added).

¹¹ Id. See also, Stamping Ground, Kentucky, 5 FCC Rcd 1772 (1990) (noting that the Commission requires "reasonable assurance that a site or potential sites meeting the Commission's requirements would be available" in making allotments) (emphasis added). In that case, the Commission granted petitioner's allotment proposal on "a finding of available sites" rather than the reference coordinates cited in the *Notice of Proposed Rulemaking* and the Report and Order.

¹² SB Opposition at 7.

plainly indicates otherwise. In Key West, Florida, 3 FCC Rcd 6423 (1988), for example, an opponent to a proposed upgrade raised concerns that the proposed transmitter location would prevent the petitioner from minimizing significant RF radiation hazard. The petitioner responded that the transmitter site in its Petition for Rulemaking was simply “a convenient reference point to demonstrate that a fully-spaced area exist[ed] close enough to the community of license to provide the required city-grade coverage and not a commitment to specify those coordinates in any future application.”¹³ The Commission granted the proposed upgrade, concluding that the opponent’s concerns were only of issue “if [the Station] upgrades at its present location,” and emphasizing that “these issues are more properly addressed at the application stage.”¹⁴ In fact, it is Commission policy to attempt to accommodate channel allotment proponents, to the extent possible, by modifying a rule making proposal to specify an alternate site or channel.¹⁵ In Chenango Bridge, Norwich, and Cincinnatus, New York, 8 FCC Rcd 6621 (1993), the petitioner’s proposal for an allotment was challenged on the grounds that the reference point of the theoretical site was below average terrain and would not meet FAA approval. Consistent with its policy, the Commission suggested a change in reference coordinates to accommodate petitioner’s allotment request, explaining that “by using the city reference coordinates” and possibly “higher ground,” the channel could be allotted to the community in compliance with the

¹³ Id. at 6423.

¹⁴ Id. (citations omitted).

¹⁵ See Greenville, Texas, 6 FCC Rcd 6048, 6049 (1991) (citations omitted) (“Greenville”). In Greenville, the petitioner proposed to move its transmitter site 17 kilometers to meet the FCC’s minimum distance separation requirements. The Commission imposed a further site restriction of 4 kilometers noting that its action did not unduly burden petitioner and “would be in accord with prior precedent.”

Commission's minimum distance separation requirement.¹⁶ Similarly, in Randolph, the Commission, after determining that the reference coordinates proposed by the petitioner (and used in the *Notice of Proposed Rulemaking*) were located in a swamp area, stated; "we have, consistent with our approach in similar situations, [footnote omitted] confirmed that another site . . . is available on dry land that meets the spacing requirements."¹⁷ In Rockport, which the Commission's Randolph decision cites as an example of the Commission's "approach in similar situations, [footnote omitted]" the Commission approved an upgrade proposal involving the use of reference coordinates located **sixteen miles** from the originally proposed reference coordinates. It determined this change was "needed to accommodate [petitioner's] request for an upgrade."¹⁸

As these cases illustrate, it is well within Commission precedent for LMC to provide the Commission with alternate reference coordinates to demonstrate that there is a suitable site within the area meeting the FCC's minimum separation requirements for Channel 288C2. Moreover, in situations such as this one (where an opponent questions the viability of a site, and where the Commission has voiced concerns regarding the same), it is appropriate for petitioner to resolve such concerns by specifying an alternate site that complies with the Commission's various technical rules.¹⁹

¹⁶ Id. at 6624.

¹⁷ Randolph at 1761 (citing Rockport, Gregory, Alice and Armstrong, Texas, 4 FCC Rcd 8075, 8076 (1989) ("Rockport").

¹⁸ Rockport, 4 FCC Rcd at 8076 (emphasis added).

¹⁹ See Homerville, Lakeland and Statenville, Georgia, 8 FCC Rcd 2953, 2954 & n.9 (1993) ("Homerville") (citing Bayboro, North Carolina, 6 FCC Rcd 4850 (1991). As both cases reveal, at the allotment stage, the Commission requires only that a theoretical site which complies with its rules exists. However, when questions
(continued...)

B. LMC Has Adequately Demonstrated That A Suitable Transmitter Site Is Available.

SB contends that LMC has not provided adequate information regarding site suitability.²⁰ This allegation is completely without support. LMC's Petition included written confirmation that the owner of the property located at specified coordinates would lease land to LMC for the construction of a 500-foot antenna tower.²¹ Finally, LMC submitted a letter from John Allen, a well-known aeronautical consultant whose expert qualifications are a matter of Commission record, opining that the FAA would likely provide a No Hazard ruling allowing WNST to operate from an antenna tower at the specified site coordinates.²² Mr. Allen's expert opinion is based on the fact that the proposed site does not impact any existing or proposed instrument approach procedures to the Charleston Executive Airport and that the proposed site is beyond the known airport traffic pattern.²³ Clearly, therefore, LMC has provided sufficient information to counter SB's claim that there is no suitable site for construction of a 500-foot

¹⁹(...continued)

regarding both the suitability and availability of a site arise, the Commission requires a petitioner to provide evidence sufficient to demonstrate that a specific site which complies with its rules exists. In Bayboro, for example, because petitioner's site was found to be in the water, the Commission, on its own, proposed an alternate site on land. It is noteworthy that Homerville, which cites Bayboro for this proposition, involved the grant of a petition for reconsideration, while Bayboro was a *Notice of Proposed Rulemaking*. In neither stage of the rule making process did the Commission consider the change in reference coordinates a counterproposal.

²⁰ See SB Opposition at 10.

²¹ See Statement of T.E. Pedersen at Exhibit A.

²² See August 19, 1996 letter from John P. Allen to Lynn Martin at Exhibit B.

²³ Id.

tower in the area of Kiawah Island. Nothing more is required of LMC at this stage of the rulemaking process.²⁴

C. SB's Claim That LMC's Petition Does Not Propose A First Local Service To Kiawah Island Is Without Merit.

SB also contends that the proposed use of Channel 288C2 at the reference coordinates cited in LMC's Petition should not be considered as a first local service to Kiawah Island, but rather as an additional radio service to the Charleston, South Carolina, Urbanized Area.²⁵ In particular, SB claims that stations seeking to reallocate a channel from a rural community to a suburban community of a nearby urban area must make the same showing currently required of stations moving into Urbanized Areas if such stations will "place a city-grade (70 dBu) signal over 50% or more of the Urbanized Area."²⁶ However, as demonstrated in the attached Technical Statement of John A. Lundin, the predicted 3.16 mV/m contours of both the proposed Kiawah Island operation on Channel 288C2 and the present WNST operation on Channel 287C3 cover more than 50% of the Charleston urbanized area.²⁷ In fact, the proposed Kiawah Island operation for Channel 288C2 will cover less of the Charleston urbanized area than does the present WNST

²⁴ See, e.g., Homerville, 8 FCC Rcd at 2954 (concluding, upon reconsideration, that the following evidence as to the availability of a transmitter site was sufficient to rebut an opponents' claim that a suitable site was unavailable: information confirming that a tower could be constructed in the proposed area which included both wet and dry lands, and a statement that a property owner in the immediate area was willing to lease the land for construction). The Commission did not require analyses from "environmental and zoning authorities" as SB speculates. See SB Opposition at 10.

²⁵ See SB Opposition at 8.

²⁶ See SB Opposition at 9, citing Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10352 ("Headland").

²⁷ See Technical Statement of John Lundin at Exhibit C.

operation.²⁸ In any event, the policy concerns underlying the required showing described in Headland centered on the original community of license's "legitimate expectation that existing service will continue" balanced against the benefits derived from the provision of a first local service to a suburban community of a nearby urban area.²⁹ Because the instant case cannot be considered a move from an undeserved rural community to a well-served suburban community, Headland is inapposite.

Furthermore, contrary to SB's allegations,³⁰ there will not be a "significant loss of service" to the area presently served by WNST at Moncks Corners. The attached Technical Statement demonstrates that there will be a predicted 1 mV/m loss service area of only 1,794 sq km and a gain area of 1,786 sq km. Further, neither the gain nor loss area would be considered "underserved" because both areas are served by more than five other AM and FM broadcast stations.³¹

III. CONCLUSION

In response to the Commission's stated concerns, LMC has demonstrated that there is a suitable, available transmitter site in the area of Kiawah Island. LMC's proposal will further the public interest by providing first local service to Kiawah Island and will not deprive Moncks Corner of its sole existing local service. Accordingly, on the basis of the foregoing

²⁸ Id.

²⁹ See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094, 7097 (1990).


³⁰ See SB Opposition at 9.

³¹ See, e.g. Douglas, Tifton and Unionville, Georgia, 10 FCC Rcd 7706, 7707 (1995).

discussion, and for the reasons set forth herein, LMC urges the Commission to grant its Petition for Reconsideration.

Respectfully submitted,

L.M. COMMUNICATIONS II
OF SOUTH CAROLINA, INC.

By: 
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Sally A. Buckman
Renee L. Roland

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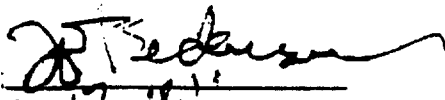
Its Attorneys

October 18, 1996

EXHIBIT A

In the event that LM Communications II receives approval of the application currently before the FCC regarding construction of a 500 foot tower, I would negotiate in good faith to lease land for this purpose.

Name: T. E. Pedersen
Address: 3381 Legareville Road
Johns Island SC 29455

Signature: 
Date: July 17, 2010

Approximate location of property: Geographic coordinates 32° 38' 57",
80° 02' 11" (NAD-27)

EXHIBIT B

John P. Allen

Airspace Consultant

Telephone
(904) 261-6523
FAX (904) 277-3651

P.O. Box 1008
Fernandina Beach, FL 32035-1008

August 19, 1996

Mr. Lynn Martin
L M Communications
P. O. Box 11788
Lexington, KY 40578

Dear Lynn:

Pursuant to a conversation with your consulting engineer John Lundin, P.E., a preliminary aeronautical evaluation was conducted near Folly Beach, SC, for the purposes of reviewing a proposed antenna tower site for a proposed antenna tower 500 feet above ground level. The aeronautical evaluation was conducted in accordance with the standards for determining obstructions to the navigable airspace as set forth in Subpart C of Part 77 of the Federal Aviation Regulations.

COORDINATES: Latitude 32-38-57 North - Longitude 80-02-11 West
(NORTH AMERICAN DATUM - 1927)

COORDINATES: Latitude 32-38-57.64 N - Longitude 80-02-10.33 W
(NORTH AMERICAN DATUM - 1983)

HEIGHT: 5 feet AMSL 500 feet AGL 505 feet AMSL

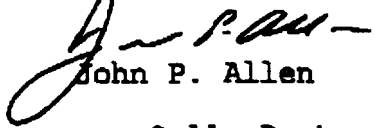
The evaluation disclosed that the proposed site was located 3.51 nautical miles from the Charleston Executive Airport reference point. The proposed site does exceed the standards of Part 77 (77.23(a)(2) by 233 feet - its height in excess of 272 feet AMSL within 3.51 nautical miles of the Charleston Executive Airport reference point). Notice to the FAA is required and the FAA will be required to circularize this proposal to the interested aeronautical community for their comments, prior to issuing a determination. The conclusion of the FAA's aeronautical study in my opinion will be a determination of No Hazard to Air Navigation.

The determination of no hazard is based upon the knowledge, that the proposed site does not impact any current or proposed instrument approach surfaces and that the proposed site is beyond known airport traffic pattern. The FAA's determination will require marking (aviation orange and aviation white) and lighting (red obstruction).

Mr. Lynn Martin
August 19, 1996
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If there are any questions regarding the evaluation, please do not hesitate to call.

Sincerely,

A handwritten signature in dark ink, appearing to read "John P. Allen", with a stylized, flowing script.

John P. Allen
cc: Sally Buckman, Esq.
John Lundin, P.E.

EXHIBIT C

TECHNICAL STATEMENT
SUPPORTING THE REPLY COMMENTS OF
LM COMMUNICATIONS II OF SOUTH CAROLINA, INC.

These Technical Comments support the reply comments of LM Communications II of South Carolina, Inc. (LM) to the opposition filed by Sampit Broadcasters (SB) to LM's petition for reconsideration of FCC action in MM Docket No. 94-70. In MM Docket No. 94-70, LM proposed to upgrade station WNST(FM) to channel 288C2 (105.5 MHz) and change the community of license from Moncks Corner, South Carolina to Kiawah Island, South Carolina. SB filed a mutually exclusive counter-proposal for channel 289A (105.7 MHz) at Sampit, South Carolina. In the Report and Order (R&O) released July 19, 1996 in the proceeding, the FCC denied both the LM and SB proposals. LM has filed a petition for reconsideration of the FCC's action in MM Docket No. 94-70.

In its opposition, SB claims LM is now proposing a counter-proposal with a new allotment reference point to its original petition. What LM has actually demonstrated in its petition for reconsideration, is that contrary to the FCC's belief¹, there is an available and suitable site in the area to locate channel 288C2 for Kiawah Island. Furthermore, as demonstrated by the aeronautical consultant's expert testimony, this site is expected to receive an FAA determination of no hazard to air navigation for a 500 foot structure.

SB alleges that the proposed use of channel 288C2 at this "new" site should not be considered as a first local service to Kiawah Island, but rather as an additional radio service to Charleston. SB bases its claim on the predicted 3.16 mV/m (70 dBu) service to the Charleston, South Carolina urbanized area.

Figure 1 is a copy of the 1990 Census map showing the Charleston, South Carolina urbanized area (shaded regions). Portions of the predicted 3.16 mV/m contours are shown for the present WNST operation on channel 287C3 (105.3 MHz) and an assumed operation on channel 288C2 (50 kW, 150 meters) at the site identified in LM's petition for reconsideration. The following is an estimate of the population (1990 Census) and land area within the contours.

¹ Last sentence of paragraph 14 of the R&O.

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Page 2

<u>Contour</u>	<u>Population</u>	<u>Land Area</u>
Present WNST 3.16 mV/m	299,866	1,684 sq km
Assumed WNST 3.16 mV/m	293,283	1,732
Charleston Urbanized Area	393,956	650
Present WNST 3.16 mV/m Coverage of Charleston Urbanized Area	276,091 (70.1%)	442 (68%)
Assumed WNST 3.16 mV/m Coverage of Charleston Urbanized Area	240,072 (60.9%)	395 (61%)

Both operations cover more than 50% of the Charleston urbanized area within the respective 3.16 mV/m contours. The assumed Kiawah Island operation on channel 288C2 will cover less of the Charleston urbanized area than does the present WNST operation on channel 287C3.

Figure 2 is a map showing the predicted 1 mV/m (60 dBu) contours for the present operation of WNST on channel 287C3 and an assumed operation on channel 288C2 (50 kW, 150 meters) at the site identified in LM's petition for reconsideration. The communities of Moncks Corner and Kiawah Island are identified. As shown, there will be predicted 1 mV/m gain, loss and common service areas. The "gain" area refers to the predicted 1 mV/m service area covered by the assumed operation on channel 288C2 but not by the present operation on channel 287C3. The "loss" area refers to the area of predicted 1 mV/m service provided by the present operation, but not by the assumed operation. "Common" area refers to the region where both the present and assumed operations provide predicted 1 mV/m service. The following is a summary of the population (1990 Census) and land areas.

<u>Contour</u>	<u>Population</u>	<u>Land Area</u>
Present WNST 1 mV/m	464,785	4,222 sq km
Assumed WNST 1 mV/m	452,072	4,214
1 mV/m Common Area	432,962	2,428
1 mV/m Loss Area	31,823	1,794
1 mV/m Gain Area	19,110	1,786

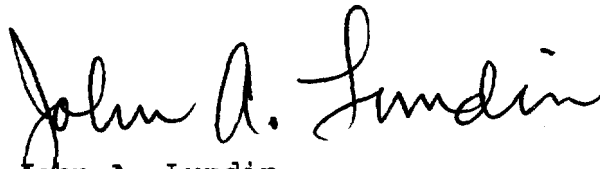
du Treil, Lundin & Rackley, Inc.

A Subsidiary of A.D. Ring, P.A.

Kiawah Island

Page 3

An examination was made of the gain and loss areas to determine if either would be considered "underserved." There are more than 8 other radio services available (AM & FM) to both the gain and loss areas. Hence, neither region would be considered underserved.

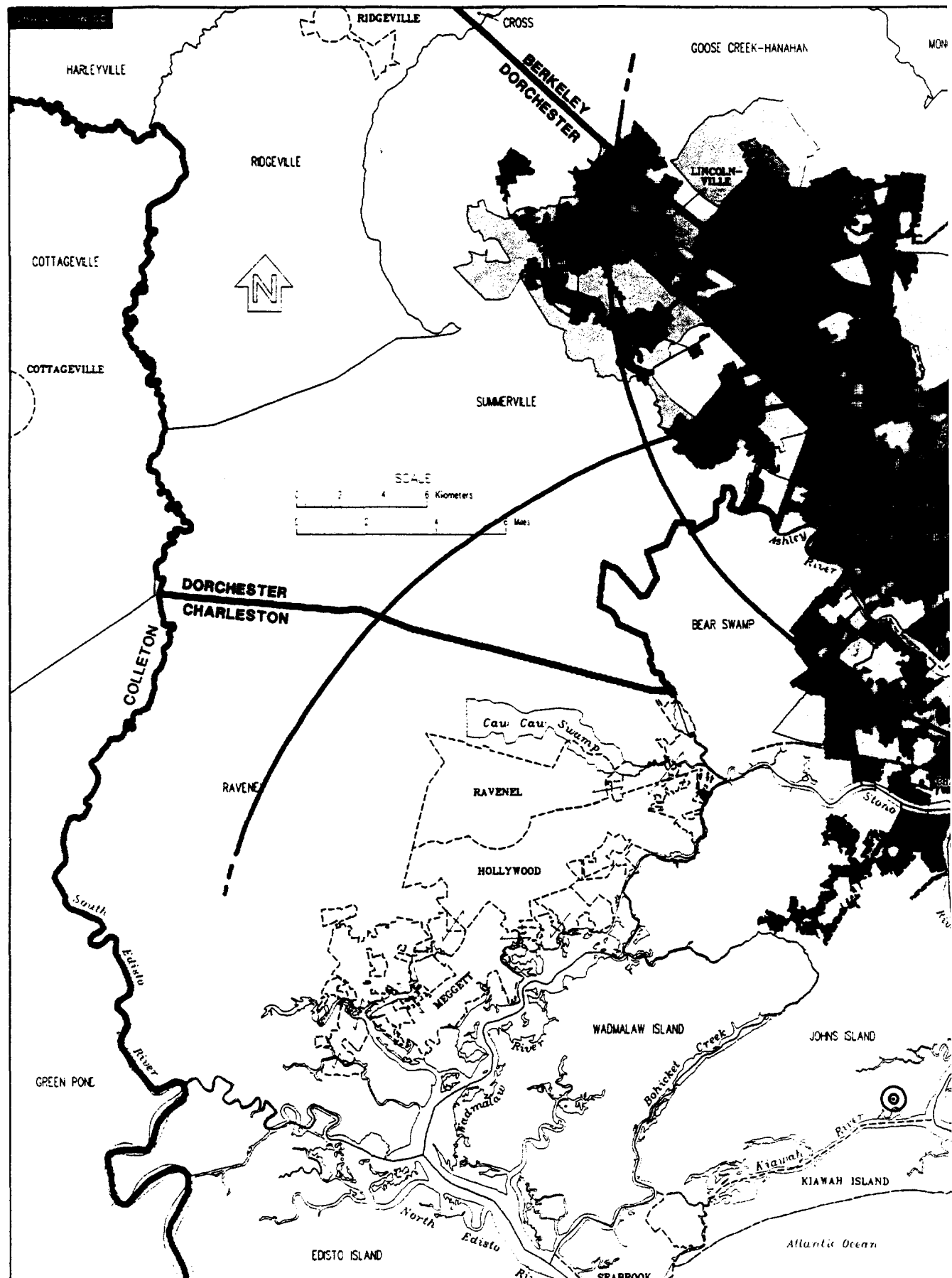
A handwritten signature in cursive script, reading "John A. Lundin". The signature is written in dark ink and is positioned above the printed name.

John A. Lundin

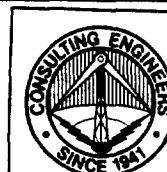
du Treil, Lundin & Rackley, Inc.
240 North Washington Boulevard
Sarasota, FL 34236-5929

October 16, 1996

Urbanized Areas



Urbanized Areas



OCTOBER 1998

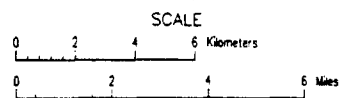
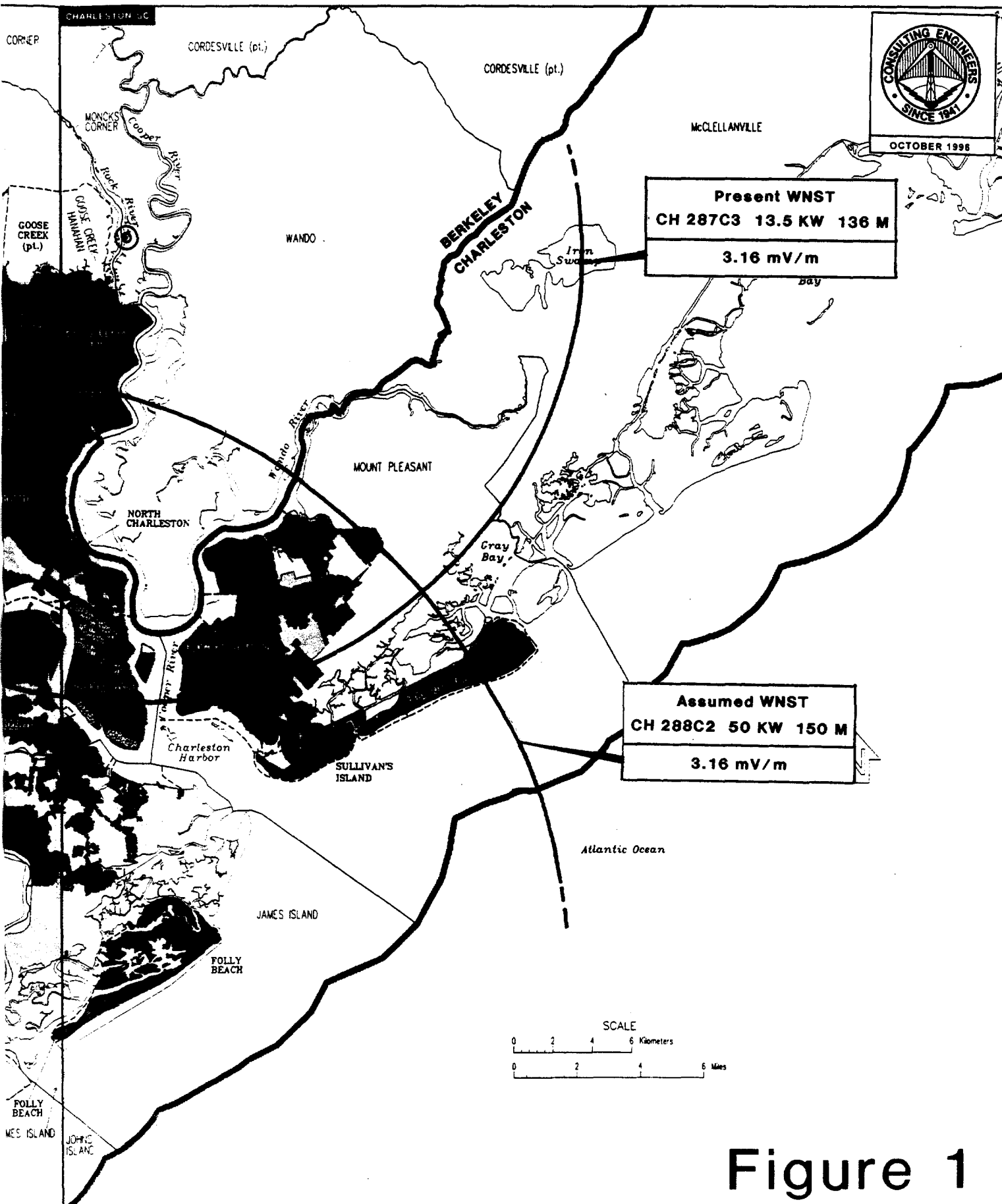
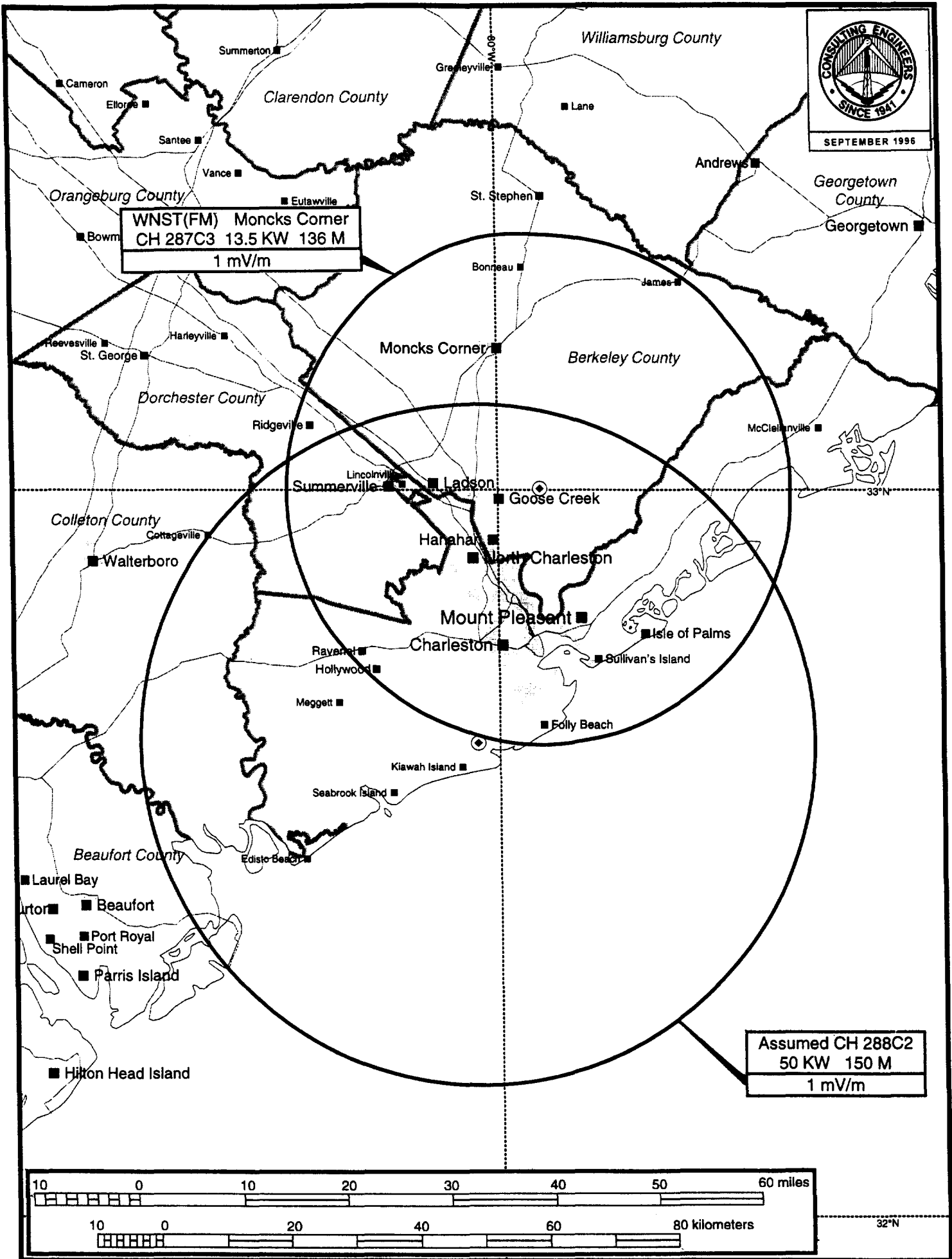


Figure 1

Figure 2



CERTIFICATE OF SERVICE

I, Maria P. Droz, do hereby certify that a true copy of the foregoing Reply To
Opposition To Petition for Reconsideration was hand-delivered, this 18th day of October 1996, to
the following:

Mr. John A. Karousos
Chief
Allocations Branch
Federal Communications Commission
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Room 536
Washington, DC 20036

Ms. Sharon P. McDonald
Federal Communications Commission
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Maria P. Droz